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ABSTRACT

This document analyzes the highlights of school finance litigation, including early attempts at convincing the U.S. Supreme Court to declare education as a fundamental right guaranteed by the U.S. constitution, and recent arguments that have shifted the responsibility for delivering education entirely to the states. Cases described include: (1) "Serrano v. Priest"; (2) "San Antonio Independent School District v. Rodriguez; (3) "Robinson v. Cahill"; (4) "Lujan v. Colorado State Board of Education"; (5) "Pauley v. Kelly"; (6) "Britt v. North Carolina"; (7) "Abbot v. Burke"; (8) "Kukor v. Grover"; (9) "Dupree v. Alma School District No. 30"; (10) "Edgewood Independent School District v. Kirby"; (11) "Helena Elementary School and (12) "Rose v. Council for Better Education." Traditional applications of state constitution equal protection provisions and decisions made regarding funding disparities are explored. Appended are a list of significant litigation that challenged state education finance systems and a National School Boards Association (NSBA) Council of School Attorneys Audio Tape Library Order Form, Publications Order Form, and membership information request form. (CLA)

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Albertina Bailey
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SCHOOL FINANCE LITIGATION: A RENEWED IMPULSE FOR REFORMS

INTRODUCTION

Parents and educators in some states have long been uneasy with the finance schemes for education which have produced excellent schools for some children but barely adequate education for others. In 1912, in one of the earliest school finance cases litigated,[1] the Supreme Court of Maine recognized that paying for education with revenues generated from property taxes benefited property-wealthy school districts, *viz*, the children of the well-to-do. That finance system, as many others later would, survived unchanged as it was found in compliance with the Maine Constitution.[2]

The reluctance of legislators to enact reforms promoting educational equity may be one of the results of an economic and political system where inequalities are congenital. But the persistent attempts at alleviating these disparities through the courts, despite the very unpredictable opinions that have been issued, indicate that the plaintiffs continue to believe that the courts can be instruments of change, that the judiciary will respond favorably to some arguments, and that changes in the finance system can be a vehicle for more sweeping reforms.

For the promoters of school reforms, the past twenty years have been a search for a responsive judicial chord. The following analysis presents highlights of that search and its often puzzling outcomes—the early attempts at convincing the U.S. Supreme Court to declare education a fundamental right implicitly guaranteed by the U.S. Constitution, and the more recent arguments which have shifted the responsibility for delivering education entirely to the states and have focused on violations of "thoroughness," "efficiency," and "equality of opportunities" standards contained in the education articles of state constitutions. In the past, arguments of alleged violations of state constitutions which had relied on concepts of fundamentality, equal protection, equal opportunity, and wealth-based discrimination had often floundered. State constitutional arguments have now succeeded in overturning school finance systems in Kentucky,[3] Texas [4] and Montana.[5] These recent pro-reform decisions have focused exclusively on whether the education system conformed to the constitutionally mandated education standard and on the obligation of the state legislature to ensure compliance. These opinions suggest that, at least in some states, courts may respond favorably to a streamlined litigation strategy, challenging not inequalities in spending per se, but measuring as a whole the system produced by such inequalities. A discussion of these decisions and some that have preceded them follows.

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1 *Sawyer v. Gilmore*, 109 Me. 169, 83 A. 673 (Me. 1912).

2 States have supplemented the resources of local districts by providing flat grants irrespective of programs, a subsidy-like contribution to districts unable to raise enough revenues to maintain a minimum level of education, and guaranteed supplements per pupil to all districts who tax themselves at the same rate, sometimes with rewards to districts with tax rates above the state mandated minimum level. THRO, *The Third Wave: The Impact of the Montana, Kentucky and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J. L. & Educ. 219 (Spring 1990).

3 *Rose v. Council for Better Education*, 790 S.W.2d 168 (Ky. 1989), Educ. L. Rptr. 1289.

4 *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex. 1989), 56 Educ. L. Rptr. 663.

5 *Helena Elementary School District v. State*, 769 P.2d 684 (Mont. 1989), 52 Educ. L. Rptr. 342.

SERRANO AND *RODRIGUEZ*: THE RISE OF STATE LITIGATION AND THE DEMISE OF FEDERAL CLAIMS

During the late 1950s and 1960s when certain civil rights and newly defined liberties, such as privacy, became established in law, education reformers hoped that education would join the ranks of fundamental rights implicitly recognized by the U.S. Constitution. The stature of education in the American social heritage, its compulsory nature, its impact on other fundamental rights such as voting, and its role in providing access to economic opportunities boded well for such an elevation. The Supreme Court bolstered these expectations when it declared in *Brown v. Board of Education*:[6]

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the **importance of education** to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values... it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right **which must be made available to all on equal terms**. [Emphasis added]

Accordingly, suits in federal courts pursued two basic arguments:[7] first, education was a fundamental right; and second, funding disparities resulting in unequal opportunities discriminated against students in poor school districts and deprived them of equal protection.[8]

The Serrano Decision

In 1971, the Supreme Court of California addressed the funding disparities of the state education finance system in *Serrano v. Priest*.[9] This case is a milestone in the evolution of school finance litigation because it bridges traditional arguments based on federal constitutional law and future arguments focusing on the responsibility of the state in the delivery of education, an obligation mentioned by the U.S. Supreme Court in *Brown*.

The California Supreme Court, interpreting *Brown* as a virtual declaration that education was a fundamental right requiring strict scrutiny, rejected the defense that control by localities over allocation of funds was a compelling state interest as "a cruel illusion for the poor school districts."[10] The *Serrano I* court declared that a financing system which based the quality of education on taxes derived from the value of local property discriminated invidiously against school children living in less affluent districts and thus violated the equal protection clause of the federal Constitution and its equivalent in the California Constitution. As discussed later, the U.S. Supreme Court would reject wealth as a suspect class in the context of evaluating education disparities under the equal protection clause in *San Antonio Independent School District v. Rodriguez*,[11] essentially precluding the successful use of wealth as a suspect class in future school finance litigation.[12]

The court reversed the trial court's decision sustaining the defense motions to dismiss, stating that the facts alleged by plaintiff, if true, show violations of both the federal and state constitutions.

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6 347 U.S. 483, 493 (1954).

7 *McInnis v. Shapiro*, 293 F.Supp. 327 (N.D. Ill. 1968), *aff'd McInnis v. Ogilvie*, 394 U.S. 322, 89 S.Ct. 1197 (1969), *Burruss v. Wilkerson*, 310 F.Supp. 572 (W.D. Va. 1969), *aff'd* 397 U.S. 44, 90 S.Ct. 812 (1970).

8 THOMPSON, *School Finance and the Courts: A Reanalysis of Progress*, 59 Educ. L. Rptr. 948 (1990).

9 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971) *(Serrano I)*.

10 *Serrano*, 487 P.2d at 1260.

11 411 U.S. 1 (1973).

12 As Thompson notes, (referring to SPARKMAN, *School Finance Challenges in State Courts*, in THE IMPACT OF LITIGATION AND LEGISLATION ON PUBLIC SCHOOL FINANCE 203 (J. Underwood & D. Verstegen eds. 1990) only California in *Serrano*, Connecticut *(Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977)), and Wyoming *(Washakie County School District No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980)) have ruled wealth as a suspect class. Most state courts have followed *Rodriguez*, disavowing that classification. THOMPSON, *supra* note 8, at 956.

The *Serrano I* court found no violation of the state constitution education article which requires only "a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year."[13] Unlike most other states, the California Constitution does not specify the standard of education to be delivered and, lacking such criteria, the state was not required to set one or to provide a given quality of education. The *Serrano I* court remanded for further proceedings and instructed the trial court to provide for the enforcement of a constitutional system if the facts were proved as alleged. After *Rodriguez* was decided, the California court stood by its earlier opinion as to the state constitution.[14]

As a precedent, the *Serrano I* ruling is less important for its outcome than for the analytical tool used by the court, i.e., the California Constitution. The obligation imposed by the education article of a state constitution and the applicability of equal protection provisions would become a gauge for measuring the constitutional soundness of a given education system.

The *Rodriguez* Decision

In 1973, the U.S. Supreme Court in *San Antonio Independent School District v. Rodriguez*, clarified its *dictum* in *Brown*, foreclosing possible interpretations of the Court's recognition of education as a fundamental right guaranteed by the federal constitution. The Court scrutinized alleged constitutional infirmities of the school funding system in Texas, and in particular the difference in pupil expenditures between the most and the least affluent districts in the San Antonio metropolitan area, respectively, Alamo Heights and Edgewood.

In analyzing the alleged discrimination against children residing in the Edgewood district, the Court rejected strict judicial scrutiny on several grounds: first, the plaintiffs failed to define a class of poor people that conformed to traditional standards of suspectness. Missing was a history of pervasive, purposeful discrimination against a definable class of the poor. Further, the Court was troubled because at issue here was not the total privation of a right or benefit but only the relatively lower quality of the right received.[15] The Court distinguished between the degree of privation arising from inequality in education and the total deprivation of liberty resulting from indigence as, for example, when an individual is unable to pay a fine, resulting in incarceration or denial of equal protection when a defendant is financially unable to retain counsel.

Before determining whether education ranked as a fundamental right, Justice Powell defined the Court's mandate as,

> ...not to create substantive constitutional rights in the name of guaranteeing equal protection of the laws . . . Nor is it to be found by weighing whether education is as important as the right to travel. Rather the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.[16]

While endorsing the opinion of the district court regarding "the grave significance of education both to the individual and to our society," the Court refused to grant education a fundamental right status, saying, "Education . . . is not among the rights afforded explicit protection under our Federal Constitution... the undisputed importance of education will not alone cause this Court to depart from the usual standard of reviewing a State's social and economic legislation."[17] The Court then followed precedent by refusing to subject state fiscal and educational policy to anything more than rational review on the grounds that the Court lacked the expertise and familiarity with local problems to interfere with "informed judgments" made at the state and local levels.

Predictably, the divided opinion (5-4) of the *Rodriguez* Court upholding the Texas school finance system as constitutional did not spur the state legislature to restructure the school finance scheme. But the decision did have three important effects: it shifted claims of deprivation of education from federal to state fora; by discrediting federal constitutional claims, in a way it allowed state courts greater flexibility in their analyses; and, obviously, it influ-

[13] CAL. CONST. art.V, § 5.

[14] *Serrano v. Priest*, 135 Cal. Rptr., 18 Cal.3d 728, 557 P.2d 929 (1976) *(Serrano II)*.

[15] This has been one of the most pervasive obstacles in convincing a court that low standards of education amount to the privation of a right and thus violate the constitution.

[16] *Rodriguez*, 411 U.S. at 34.

[17] *Id.* at 35.

enced the decisions of state courts. As will become apparent, some of these courts have deftly avoided using equal protection analysis in favor of a more independent review (see Appendix).

EDUCATION ARTICLES OF STATE CONSTITUTIONS: SOME SURPRISING AND SOME TRADITIONAL APPLICATIONS OF EQUAL PROTECTION

During the past two decades, plaintiffs challenging school finance systems in their states have asserted violations of the education articles and the equal protection provisions of the constitutions in their respective states. Many states have nearly identical language in their education articles, but the interpretations and the methods of analysis used by the courts have been far from uniform. Consequently, it has been nearly impossible to predict the outcomes of these challenges. For historical review purposes, but also in the hope of gaining some understanding, a few of these decisions are presented side by side when feasible.

Robinson v. Cahill: Reconstructing Strict Judicial Scrutiny

Eleven days after the *Rodriguez* decision was issued, the Supreme Court of New Jersey upheld the decision of the trial court in *Robinson v. Cahill.*[18] The trial court had ruled that local taxation schemes, paying for sixty-seven percent of public school costs, violated the education provision of the state constitution and discriminated against students from property-poor districts who were not afforded equal educational opportunity. The New Jersey Constitution states that "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."[19]

In deciding the method and scope of analysis, the court echoed some of the constitutional principles articulated by the Supreme Court in *Rodriguez* but reached a different result through the use of the education article of the state constitution. The court acknowledged the vital role of education but refused to declare education a fundamental right under the state constitution, because "[n]o one has successfully defined the term for this purpose."[20] The court found that rights whether explicitly or implicitly guaranteed in the constitution can be vulnerable. For example, the right to acquire and hold property is explicitly mentioned in the U.S. Constitution but has never been declared a fundamental right. And even when the right is fundamental, a compelling government interest can, under certain circumstances, restrict or suspend it. Well aware that declaring education a fundamental right would have impacted on other services provided by the state, the court, following the reasoning in *Rodriguez*, quickly noted that the delivery of a service by the state is no proxy for fundamentality.

The *Robinson* court was even more ambivalent about whether to accept wealth as a suspect class, "Whether wealth is invidious in its impact upon the enjoyment of rights and benefits is a more complex question . . . but not suspect in all settings."[21] In addition, judicial strict scrutiny could not be used here in a mechanistic way since the court could not define when a state interest becomes "compelling." The court refused to hold either that education is a fundamental right or that wealth is a suspect class in this context. It found that the New Jersey educational system could not be held unconstitutional under either analysis.

The court skirted around the state constitutional equivalent of the equal protection clause at first conceding that "a State Constitution could be more demanding than the federal constitution," but later concluding that, "[t]he equal protection proposition potentially implicates the basic tenet of local government that there be local authority with concomitant fiscal responsibility . . . we will not pursue the equal protection issue in the limited context of public education."[22]

Following this rather meandering discourse, the court found its voice in assigning squarely to the state the responsibility for implementing the constitutional mandate for "a thorough and efficient system of free public schools."[23] Although disagreeing with the plaintiffs' contention that fiscal responsibility for education cannot be delegated to local districts, the court held that "the end product must be what the Constitution demands . . . Whatever the reason for the violation, the obligation is the State's to rectify it."[24]

18 303 A.2d 273 (1973).

19 N.J. CONST. art. VII, § 4 ¶ 1.

20 *Robinson*, 303 A.2d at 282.

21 *Id.* at 283.

22 *Id.* at 287.

23 *Id.* at 288.

24 *Id.* at 294.

A review of the history of constitutional debates convinced the court that equal opportunity of education had guided the drafters. The court agreed with the trial court's finding that discrepancies in the per pupil funding of education led to the constitutional violation. "We deal with the problem in those terms because dollar input is plainly relevant and because we have been shown no other viable criterion for measuring compliance with the constitutional mandate."[25] The present funding system, supplemented by revenues from property taxes and the state aid program, the court ruled, had no apparent relationship to achieving the mandate of equal educational opportunity, but rather amounted to a "patchy product reflecting provincial contests rather than a plan sensitive only to the constitutional mandate."[26] What the court could not accomplish through judicial strict scrutiny analysis, i.e., a finding that the educational system violated the state constitution's equal protection provision, it accomplished by relying solely on the education mandate in the state constitution, one of the only two decisions to do so before 1989.[27]

Trying to avoid judicial activism, the *Robinson* court suggested very general, prospective remedies in nature and proposed holding hearings to determine whether specific instructions for redistribution of funds could come from an authority other than the legislature. It gave no deadline for producing a suitable alternative funding scheme. This cautious approach while justifiable, probably delayed legislative passage and implementation of reforms, as witness the 1990 school financing case in New Jersey, *Abbott v. Burke*,[28] which has been the result of previous ineffective attempts at school finance reforms.

Lujan v. Colorado State Board of Education: Rational Basis Review by the Book

The complexities bedeviling the New Jersey Supreme Court in *Robinson* are absent in some of the opinions by other courts involving alleged constitutional violations of virtually identical articles. Article IX, Section 2 of the Colorado Constitution reads as follows, "The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously." The straightforward application of the equal protection test by the Colorado Supreme Court[29] in *Lujan v. Colorado State Board of Education*,[30] offers a sharp contrast to the complex analysis of *Robinson*.

In *Lujan*, appellees had argued that the school finance system, which relied for 47 percent of its funding on property taxes, interfered with their fundamental right to education by creating a suspect class based on wealth and violating the equal protection guarantee of the Colorado Constitution. The finance system also violated the "thorough and efficient" provision of Article IX. The trial court ruled that the system did not pass muster under strict judicial scrutiny and declared it unconstitutional. Defendants appealed, and the state supreme court reversed.

First, the Colorado Supreme Court determined that education was not a fundamental right either under the federal or the state constitution. The court's reasoning kept close step with the analysis in *Rodriguez*, namely: the importance of education is not a determinant of its fundamentality. Nor would the court adopt the rationale that deprivation of educational opportunity infringes fundamental rights such as free speech and voting under the guise of enforcing a "fundamental right." The court provided no specific interpretation of the Colorado constitutional provision to support its denial of education as a fundamental right. Instead, it went on to say that appellees did not argue that they were denied educational opportunities altogether, but that the "thorough and uniform" provision *guaranteed* uniform opportunities to all students. This the court would not accept.

On the issue of whether wealth was a suspect class, again the Colorado court followed *Rodriguez* closely. The *Lujan* court further noted that, in addition to the lack of characteristics of a suspect class,

[25] *Id.* at 295.

[26] *Id.* at 297. Other courts, in upholding present school finance systems, viewed the inequalities as congenital to any taxation systems and, in that context, "provincial contests" could then be considered a sign of robust local autonomy, necessary to maintain local controls.

[27] The only other case which relied exclusively on the education clause of the state constitution was *Seattle School District Number 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978). THRO, *supra* note 2, at 239.

[28] 575 A.2d 359, 119 N.J. 287 (1990).

[29] *See* Appendix for additional courts who have adopted a rational basis test to uphold existing school finance systems.

[30] 649 P.2d 1005 (Colo. 1982), 6 Educ. L. Rptr. 191.

a political body such as a poor school district could not constitute such a class because equal protection relates to individual rights and by its nature is limited to guaranteeing individuals certain rights.

Having rejected strict judicial scrutiny, the court was sympathetic to appellants' contention that control by localities over local property tax revenues was the unstated objective for the finance system and that such system was a rational method for preserving that control. Lastly, the court refused to rule that the present system violates the "thorough and uniform" provision merely because it results in different levels of spending. On the contrary, existing statutes ensuring a uniform teacher certification program, a uniform system of school finance, and general availability of the public school program implemented the "thorough and uniform" mandate. Neither the majority opinion nor the two dissents provided any illustrations that disparities in funding resulted in disparities in the quality of education, the existence of which might have caused the court to reach a different result.

Pauley v. Kelly: "Thorough and Efficient" Defined

By 1979, when *Pauley v. Kelly* [31] reached the Supreme Court in West Virginia, thirteen finance suits had been filed in state courts following the *Robinson* decision (1973 through 1979). With four decisions favoring finance reforms,[32] the ruling of the West Virginia Supreme Court is surprising in its breadth and specificity, and contrasts with *Robinson*.

Breaking from decisions of state courts which drew upon the standards established in *Rodriguez*, the West Virginia Supreme Court asserted its prerogative as a state court to evaluate its responsibility for education, "[a] state is not constrained by the federal constitutional standard, but must examine its own constitution to determine its education responsibilities."[33]

The court then proceeded to define the "thorough and efficient system of free schools" by studying constitutional debates and definitions from case law discussing similar constitutional provisions from other states.[34] According to the court, the provision translated into requirements to establish an educational system conducive to the development of the minds, bodies and social morality of its charges, necessary to prepare them for a variety of activities as citizens and adults, and to do so economically. The court elaborated further on its definition, specifying a combination of eight goals and activities and two supporting services. Summing up the constitutional issues, the court concluded that the educational article and the equal protection clause in the West Virginia Constitution could be applied harmoniously to a school finance system, making education a fundamental right in this state subject to strict judicial scrutiny.

The *Pauley* decision expanded considerably the platform on which the *Robinson* decision had rested. The court here unreservedly regarded the state constitutional mandate as establishing a fundamental right for education and reasserted the principle alluded to in *Robinson*: a state equal protection clause can be more stringent than its equivalent in the federal Constitution, and, therefore, West Virginia's equal protection clause applied to the "fundamental" right of education. However, the court clarified that before any determination could be made as to whether the school finance scheme met the "thorough and efficient" standard, there would first have to be an assessment of whether the local school district at issue was being operated in a reasonably efficient manner.

In contrast to the *Robinson* court which voiced many misgivings about the appropriateness of applying strict judicial scrutiny in a school finance suit, the West Virginia court adopted that standard without reservation. The court reviewed the various mechanisms of school finance, i.e., the foundation

[31] 255 S.E.2d 859 (W. Va. 1981).

[32] Decisions for reforms: *Knowles v. State Board of Education*, 219 Kan. 271, 547 P.2d 699 (1976), *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977), *Serrano v. Priest* (II), 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *Seattle School District v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978). Decisions against reforms: *Milliken v. Green*, 390 Mich. 389, 212 N.W.2d 711 (1973), *Blase v. State*, 55 Ill. 2d 94, 302 N.E.2d 46 (1973), *State ex rel. Woodahl v. Straub*, 164 Mont. 141, 520 P.2d 776 (1974), *Northshore School District No. 417 v. State*, 84 Wash. 2d 685, 530 P.2d 178 (1974), *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975), *Buse v. Smith*, 74 Wis.2d 550, 247 N.W.2d 141 (1976) (striking down tax reforms already in place), *Olsen v. State*, 276 Or. 9, 554 P.2d 139 (1976), *Danson v. Casey*, 484 Pa. 415, 399 A.2d 360 (1979), *Board of Education v. Walter*, 58 Ohio St.2d 368, 390 N.E. 813 (1979).

[33] *Pauley*, 255 S.E.2d at 864.

[34] "The legislature shall provide by general law, for a thorough and efficient system of free schools." W. VA. CONST. art. XII.

aid statute, excess levies voted by citizens in a given county, and concluded that some of the provisions were not under attack or that evidence was insufficient to find a violation of the equal protection clause. The court directed that evidence be developed on remand to prove whether property tax revenues were in fact derived from faulty appraisements in poor counties as alleged, that standards be designed for determining whether building funds were allocated correctly. Also the role of the State Board of School Finance was to be reviewed, and the performance of the State Superintendent of Schools and State Board of Education was to be evaluated for compliance with their statutory responsibilities. The court, while deferring final judgment, ordered that the leaders of the state legislature be added as defendants in the suit since that body was constitutionally charged with the responsibility of devising a thorough and efficient school system. For West Virginia, this judicially imposed investigation triggered the overhaul of the entire state educational system. By contrast, the *Robinson* decision effected no such vast transformation in New Jersey, as the progeny of *Robinson* attest.

During the past two decades the eclectic decisions of state courts have resulted in part from the equally varied interpretations of the education articles of state constitutions and in part from some courts' unorthodox application of equal protection analysis. The right to education even when recognized as a fundamental right has not automatically triggered strict judicial scrutiny nor has it necessarily been translated into an obligation by the state to provide equal opportunities, equally shared among all children. Equal opportunities, even when specifically included, have not always been interpreted to mean equal distribution of resources or an obligation to narrow large disparities in per pupil spending. Some illustrations are presented below.

Britt v. North Carolina: Equal Opportunity v. Unequal Funding

In *Britt v. North Carolina*,[35] plaintiffs alleged that the disparities in the school finance system breached their right to equal opportunities to education based on Article IX of the North Carolina Constitution. Article IX, Section 2(1) ensures that "The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months of the year, and wherein equal opportunities shall be provided for all students." The trial court dismissed the case against some of the defendants on the basis of failure to state a claim on which relief could be granted and for lack of subject matter jurisdiction.

The appeals court now faced the dilemma of reconciling apparently conflicting provisions, one clause offering equal opportunities to education for all students, the other hindering this equality by permitting the state to delegate a share of the financial responsibility for education to localities through taxation, which inevitably produces varied "opportunities." The court contrived a constitutional consonance between the provisions by interpreting equal opportunity narrowly.

In 1970, North Carolina legislators had amended the state constitution to purge it of the "separate but equal" clause. In reviewing supporting documents to the amendment, the court noted that all other aspects of the education system were to remain unchanged, including its system of financing. The court then recalled that the U.S. Supreme Court in *Brown v. Board of Education* had struck down state sanctioned segregation as denying equal opportunities to minorities. It also noted that in the past the North Carolina Supreme Court [36] had ruled that the fundamental right to education consisted of equal access to attend public schools and, on a different occasion,[37] the appeals court had declared that "[t]here is no requirement that it [the state] provide identical opportunities to each and every student." In *Britt*, the court concluded that the equal opportunity language had been preserved to guarantee equal access, the goal of desegregation. This narrow reading, limiting equal opportunity to equal access to education, did not affect the existing finance system and the ensuing disparities in the overall offerings for education.

Abbot v. Burke: Relief for New Jersey Urban School Districts

The latest decision by a state supreme court in a school finance case, *Abbott v. Burke*,[38] was handed down in 1990 in New Jersey, a state no stranger to

[35] 86 N.C. App. 282, 357 S.E.2d 432 (1987).

[36] *Sneed v. Board of Education*, 299 N.C. 609, 264 S.E.2 106 (1980).

[37] *Kiddie Korner v. Board of Education*, 55 N.C. App. 134, 138-39, 285 S.E.2d 110, 113 (1981).

[38] 119 N.J. 287, 575 A.2d 359 (1990).

school finance reforms, implemented as a result of *Robinson v. Cahill* and pursued in six additional suits.[39] The Public School Act, a funding equalization plan which was finally enacted in 1975, was to have been the instrument for achieving thoroughness and efficiency in education as required by the New Jersey Constitution. In 1976, the New Jersey court ruled that the Act was facially constitutional in *Robinson V.*[40] The reforms, however, maintained large differences in expenditures among districts, and the education received by students in most poor urban districts did not meet the educational standard established in *Robinson I*: "an educational opportunity . . . needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market." [41] That might mean that in low socioeconomic areas a variety of individualized services would have to be provided to students in addition to the basic math, science and English skills. "[T]he clear import [of the constitutional standard] is not of a constitutional mandate governing expenditures per pupil, equal or otherwise, but a requirement of a specific substantive level of education."[42] The Commissioner of Education refused to accept the decision from an administrative judge that the Public School Education Act (the Act) as applied to poor urban districts was unconstitutional. The State Supreme Court ruled that the Act had not achieved the "thorough and efficient" standard in 28 out of 29 urban districts (Atlantic City was the one exception because of its high tax base). Spending disparities persisted partly through the minimum aid provisions of the Act which rewarded districts capable of allocating more funds to education than required by the Act by virtue of their high tax base. The results ran counter to the goal of the state aid formula designed to narrow disparities. The court's ruling that this funding mechanism was unconstitutional in most urban districts contrasts with the 1979 decision by the Ohio Supreme Court in *Board of Education v. Walter*,[43] in which a similar system of rewards was upheld under the "thorough and efficient" standard. In that case, the possibility that a more efficient system could be put in place did not invalidate the present less efficient system. In *Abbott*, the New Jersey Supreme Court reiterated that while some inequalities could be tolerated the "thorough and efficient" provision was an all pervasive standard which must be applied without exception throughout the state; allocation of funds, especially for poor urban districts, could not depend on discretionary amounts to be raised by local districts.

States with sizeable urban school districts in the process of formulating school financing reforms may derive some lessons from the New Jersey experience, that state having been one of the first to address the constitutional inadequacy of its education funding and where spending per pupil is among the highest in the country[44] The court discussed at length the "effective schools" issue raised by the state. The state argued that money is less relevant than educational factors, such as class size, in determining an "effective" school. The court agreed that money alone will not produce effective schools, but said "concerning the poorer urban districts . . . we have found a constitutional failure no matter what test is applied to determine thorough and efficient."[45] The court dwelled at length on the deficiencies in educational resources of urban districts as compared to those of nine affluent districts. For example, the Princeton District provided one computer per eight children while in East Orange the ratio was 1 to 58. Paterson, as another contrast, offered no computer education other than basic skills programs. The science programs were re-

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39 *Robinson v. Cahill (II)*, 63 N.J. 196, 306 A.2d 65 (1973); *Robinson v. Cahill (III)*, 67 N.J. 35, 335 A.2d 6 (1975); *Robinson v. Cahill (IV)*, 67 N.J. 333, 339 A.2d 193, *reprinted in corrected form*, 69 N.J. 133, 351 A.2d 713 (1975); *Robinson v. Cahill (V)*, 69 N.J. 449, 355 A.2d 129 (1976); *Robinson v. Cahill (VI)*, 70 N.J. 155, 358 A.2d 155 (1976); *Robinson v. Cahill (VII)*, 70 N.J. 464, 360 A.2d 400 (1976). As noted by Thro., *supra*, at note 2 at 233, the seven suits which were necessary for the revised finance plan (inadequate as it was eventually found) to be put in place attest to the unwillingness of the New Jersey legislature to enact finance reforms and the unwillingness of the court to intervene. The postponements of reforms, hearings on what a judicial remedy should entail, refusal to fund the plan when finally enacted and, in the end, the court's injunction keeping schools closed until funding was appropriated, seem according to the writer of this article more like attempts at keeping the issue of school reforms alive rather than result-producing steps.

40 For the highlights of the protracted litigation spanning the seven *Robinson* suits *see* THRO, *supra* note 2, at note 65.

41 *Robinson I*, 303 A.2d at 273.

42 *Abbott*, 575 A.2d at 368.

43 58 Ohio 368, 390 N.E.2d 813 (1979).

44 But as the court pointedly observed, "the excess spending [in the wealthy districts] could not be somehow allowed to mask a failure to achieve thoroughness and efficiency in other districts. *Abbott* 575 A.2d at 369.

45 *Abbott*, 575 A.2d at 395.

ported to be seriously deficient in the poor districts. Since schools equipped with labs built in the 1920s did not have sufficient supplies, such as microscopes, hands-on experiments could not be carried out. The decision continues over many pages to compare the vast differences among the urban and suburban districts' programs for foreign languages, music, physical education and art.

The importance of the New Jersey decision lies first in the court's willingness to declare only parts of the system unconstitutional,[46] and second, in the court's recognition of the acute problems in urban areas which consume funds that otherwise could be spent for education.[47]

Kukor v. Grover: Fundamental Right and Rational Basis Review

On occasion, courts have declared education a fundamental right in their states but have refused to adopt strict scrutiny analysis. In *Kukor v. Grover*,[48] plaintiffs based their claims on violation of the Wisconsin Constitution[49] and attendant equal protection deprivation. Specifically, plaintiffs argued that the finance system failed to compensate districts with a high concentration of poor students for expenditures required for compensatory education, dropout prevention programs, vocational education, security, etc.[50]

After declaring that education is a fundamental right in Wisconsin, the state supreme court interpreted the "nearly as uniform as practicable" provision. The history of Article X convinced the court that uniformity of education related to the character of education (required curriculum, teachers' certification, number of school days) and not to uniformity of expenditures. As constitutionally mandated, school expenditures were met in part by an allocation from the state school fund and in part by local property taxes. In addition, the state provided a supplement to less affluent districts.

The court found no violation of the education article since there had been: (1) no denial of the right to attend schools free of charge, and (2) no failure by the state to distribute funds to the less affluent districts in amounts at least equal to those in other districts. In fact if any discrimination took place, it occurred against the wealthier districts which received less state funds than poor districts.

Because no deprivation of a right occurred, the court refused to proceed with a strict scrutiny analysis. Plaintiffs only contested the differences in levels of expenditures and, as such, a rational basis review sufficed to test their legitimacy.[51] Predictably, the court held that local control over funding allocations satisfied the rationality requirement.

The decisions discussed above illustrate two points: first, provisions mandating equal opportunities and uniformity for education in a state constitutional article can be interpreted narrowly to apply only to certain minimum standards but not all elements of an educational system. In the cases discussed, they did not override coexisting constitutional provisions that sanction funding differences. Second, some courts have been unwilling to use strict scrutiny irrespective of the importance of education as a right. This independent approach has, however, been used on one occasion to the benefit of school finance reforms.

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46 In the past, other courts did not issue such discrete rulings. Many were not willing to strike down an entire education system because some of its districts needed improvements.

47 Courts have not always been sympathetic to the plights of urban school districts. In *Board of Education v. Nyquist*, 453 N.Y.S.2d 643, 57 N.Y.2d 27 (1982), the New York Supreme Court rule that "municipal overburden" was not a violation of equal protection and the state was not required to compensate urban school districts for their financial burden with additional state aid. In *Hornbeck v. Somerset County Board of Education*, 295 Md. 597, 458 A.2d 758 (1983), the Supreme Court of Maryland upheld the school finance system under a rational basis review without special consideration of the urban problems of Baltimore City. Interestingly, David Hornbeck, then Maryland Commissioner of Education, was later hired to restructure the Kentucky school system following the decision in *Rose v. Council of Better Education* in that state. For more discussion of the issues surrounding the "municipal overburden" argument, see BRAZER & MCCARTY, *Municipal Overburden: A Fact in School Finance Litigation?*, 18 J. L. & Educ. 547 (Fall 1989).

48 148 Wis.2d 469, 436 N.W.2d 568 (1989), 52 Educ. L. Rptr. 241.

49 "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years..." WIS. CONST. art. X, §3. Article X, §5 provides that the state contribution will be distributed as "a just proportion to the number of children and youth resident therein," and that "no appropriation shall be made from the school fund to any city or town for the year in which said city or town shall fail to raise such tax."

50 *See* note 47 for related rulings.

51 The Arizona Supreme Court used similar reasoning in *Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973), ruling that an education finance system meeting basic constitutional requirements and which was neither discriminatory nor capricious, needed only a rational explanation for funding disparities.

Dupree v. Alma School District No. 30: Funding Disparities as Irrational

The 1983 decision in *Dupree v. Alma School District No. 30*,[52] by the Supreme Court of Arkansas is the first ruling invalidating a school finance system [53] on the strength of a rational basis test. The court avoided a formal classification of the right of education, stating that "the right to equal educational opportunity is basic to our society," as reflected in the constitutional mandate for the public school system and upheld the application of the equal protection clause because it saw no basis for holding it inapplicable. The brief opinion does not dwell on legalistic interpretations of the constitutional provision but adamantly refuses to uphold the constitutionality of a school finance system which resulted, at the extreme, in revenue disparities from $2,378 to $873 per student, and even in the 5th and 95th percentiles showed a difference of $1,576 to $937. In addition to disparities resulting from property revenues, the effects of past "hold-harmless" laws which guaranteed that no district would receive less funds in the future than in the past, irrespective of enrollment, further aggravated disparities. Under the "hold-harmless" provisions, districts with declining enrollments would continue to receive higher allocations irrespective of need. Also, vocational programs in poorer districts could not be established because the districts were unable to provide local funding for them, a prerequisite for eligibility for state assistance. Borrowing freely from *Serrano I*, the court held that an interest in maintaining local control over school financing was not a rational basis for a system resulting in extreme financial disparities between districts. Further, the court opined that an equitable statewide school finance system did not necessarily preclude local control over the schools. The determined tone of the opinion, the avoidance of narrow legal interpretations and recasting of arguments, and its focus on the present gross disparities evinced a commitment to achieve some equity in education. The *Dupree* opinion foreshadows the strategy used in three cases decided in 1989.

[52] 279 Ark. 340, 651 S.W.2d 90 (1983).

[53] "Intelligence and virtue being the safeguards of liberty and bulwark of a free and good government the State shall ever maintain a general, suitable and efficient system of free public schools ARK. CONST. art. 14, § 1.

STATE CONSTITUTIONS REVISITED

By 1989, banking on a constitutional platform as a winning strategy for school finance reforms appeared risky: in the 27 cases litigated from 1973 through 1988, courts had upheld 17 systems (see Appendix). The pro-finance reform decisions in 1989 in Texas, Montana and Kentucky using the education articles of state constitutions result from a strict interpretation of the state constitution together with evidence of wide educational disparities between rich and poor districts.

Edgewood Independent School District v. Kirby

The reentry of the Edgewood School District into the fray of school finance litigation attests to the failure of the Texas legislature to improve an ailing education system. In the *Edgewood Independent School District v. Kirby* [54] opinion, the Texas Supreme Court noted a per pupil spending gap of $2,112 to $19,333 and a 700 to 1 ratio in property wealth per student ($14 million to $20,000), in a system relying for 50 percent of its resources on property tax revenues. The court dwelled on the meager returns of taxation for education in the poor districts relative to their considerable taxing effort. In the poorest property districts, for example, a tax rate of 74.5 cents for $100 valuation yielded an average of $2,978 per pupil spending while in the hundred wealthiest districts a 47 cents tax rate allowed average expenditures of $7,233 per student. The amounts poor districts could spend was further reduced by a high proportion of debt servicing. The court considered these inequities as irrefutable evidence that the present system violated the efficiency standard contained in Article VII of the state constitution.[55] The court also pointed out that the legislature had a proactive mandate for fulfilling its constitutional obligation, and while it was not the court's duty to spell out the ways and means for carrying it out, the court was obliged to tell the lawmakers when they had not done so.

[54] 77 S.W.2d 391 (1989), Educ. L. Rptr. 666.

[55] Article VII, § 1 of the Texas Constitution provides that "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

Without expounding any equal protection analysis, the court reversed the court of appeals and reaffirmed with modification the trial court which had found the finance system in violation of the "due course of laws" guarantee, the equal rights guarantee and the efficient public schools mandate of the Texas Constitution. Focusing on the efficiency mandate, the supreme court found that the inequalities were obviously not the result of an efficient education system that the drafters of the constitutional article intended. Efficiency of education meant a result-producing system. Here the state efforts at equalization through the Foundation School Program could not even attain the state-mandated minimum requirements; therefore the court declared, "a band-aid will not suffice; the system itself must change." While an education system does not have to resort to per capita distribution for equity, neither does it have to condone such gross inequities. Before declaring that the system violated the Texas Constitution, the court disposed of the state's argument that the present finance system was authorized by a 1883 amendment of Article VII regarding local taxation. According to the court, the amendment was not meant to preclude efficiency but to provide additional funds.

Given this ruling, the court thought it unnecessary to discuss "other" constitutional arguments, stayed the effect of the judgment of the trial court until May 1, 1990 and firmly exhorted the legislators to act speedily.

Helena Elementary School District v. State

In *Helena Elementary School District v. State*,[56] the Montana Supreme Court considered without preamble whether the funding of public schools violated Article X, Section 1 of the Montana Constitution which guarantees equal educational opportunities to each person in the state [57] and stated *a priori* that it would not undertake equal protection analysis based on the state equal protection provision.

On the evidence that large per pupil spending disparities existed among districts, the Montana Supreme Court refuted the state's argument that educational output, i.e., the achievement levels of students from various districts, was a more appropriate measure of educational opportunities than dollar expenditures. Equally unsuccessful was the state's explanation that fiscal difficulties were responsible for the inequalities. Most importantly, and not unlike the *Serrano* and the *Edgewood* courts, the Montana Supreme Court refused to accept the defense that disparities resulted from local control and that to preserve the latter, the former had to be tolerated. That the school district trustees were constitutionally empowered to supervise and control schools did not translate into judicial acceptance of such disparities. Having rejected equal protection analysis as unnecessary to its decision, the court refrained from ruling on the finding by the trial court that education in Montana was a fundamental right. No prescription for improving the system issued from this decision. This was probably in recognition of the multifaceted ingredients composing an educational system and, no doubt, out of concern not to transgress into legislative territory.

As pointed out by one author,[58] the Montana Supreme Court in *State ex rel. Woodahl v. Straub*,[59] had accepted the state's defense that the Foundation Program fulfilled its constitutional obligation. In *Helena*, this defense was rejected although the contribution by the state Foundation Program to the overall educational system, at 65 percent in 1974 when *Woodahl* was litigated, remained at the same level in 1985-86 and, presumably, had not become more inefficient. As Thro remarks,[60] the changed composition of the court may account for this reversal. It seems a foregone conclusion that a court's responsiveness to the need for making higher quality education available to all students, i.e., a keener inclination towards egalitarianism in the educational services provided by the state bears on a court's judicial approach and informs its final judgment.

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[56] 769 P.2d 684 (Mont. 1989), 52 Educ. L. Rptr. 342.

[57] Article X, Section 1 of the Montana Constitution provides, "Equality of educational opportunity is guaranteed to each person ... The legislature... shall fund and distribute in an suitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system."

[58] THRO, *supra* note 2, at 235.

[59] 164 Mont. 141, 520 P.2d, 776, *cert. denied*, 419 U.S. 845 (1974).

[60] THRO, *supra* note 2, at 235.

Rose v. Council for Better Education

In *Rose v. Council for Better Education*,[61] the Supreme Court of Kentucky restricted its analysis to one question, whether the present education system violated the education article of the state constitution and specifically the efficiency standard contained therein.[62] In spite of a rather wordy articulation, the opinion conforms to the analytical conciseness of the decisions from Texas and Montana and follows a similar rationale:

- sheer weight of evidence—the overall quality of the Kentucky system of education was by any standard inferior, ranking in the lower 20-25 percentile nationally, and its inferior quality and inequalities were a form of discrimination against 80 percent of the state's school children;
- education was a fundamental right (however, the court did not use fundamentality for equal protection analysis. The Texas and Montana courts did not rule on this issue either);
- the constitution required an efficient school system, a standard defined by these courts as requiring substantial uniformity, substantial equality of financial resources and substantially equal education opportunity for all students;
- the state's argument of having done all it could to improve education was ineffectual. The court could not accept that the state had fulfilled its mandate to provide efficiency in education by reasonably managing available resources. "Efficiency" required an acceptable quality and uniformity. The emphasis has therefore shifted from a financial to a qualitative standard; and
- evidence proved that the educational system did not meet the constitutional requirement of efficiency.

The court compensated for the succinct legal analysis by the breadth of its ruling:

> Lest there be any doubt, the result of our decision is that Kentucky's entire system of common schools is unconstitutional. There is no allegation that only part of the common school system is invalid, as we find no such circumstance. The decision applies to the entire sweep of the system—all its parts and parcels . . . [including] the statutes creating, implementing and financing the system and to all regulations, etc. pertaining thereto . . . the creation of local school districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. [63]

Finally, the court defended its prerogative to define the constitutionally mandated standard for education, translating that standard into nine characteristics [64] and seven "capacities" to be provided

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61 790 SW.2d 168 (Ky. 1989), 60 Educ. L. Rptr. 1289.

62 The Kentucky Constitution, § 183 reads, "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools through the state."

63 *Rose*, 790 S.W.2d at 215. The scope of the decision is reminiscent of *Pauley v. Kelly*, where the West Virginia Supreme Court imposed a wide ranging review of many of the components of that education system.

64
1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.
2) Common schools shall be free to all.
3) Common schools shall be available to all Kentucky children.
4) Common schools shall be substantially uniform throughout the state.
5) Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.
6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.
7) The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.
8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.
9) An adequate education is one which has as its goal the development of the seven capacities recited previously.

Rose, 790 S.W. 2d at 212-13.

to *every* child.[65] While refraining from specifying how the new school system should be created, the court directed the legislature in no uncertain terms to raise property assessments to 100 percent of their fair market value, if *ad valorem* property taxes were going to be used in a restructured finance system. In addition, the General Assembly was directed to establish a uniform tax rate for such property.

The *Edgewood, Helena* and *Rose* decisions lead to several observations:

- defining education as a fundamental right has not been imperative for holding the state responsible for providing a constitutionally mandated standard of education. Historical interpretation of the education article indicating that the drafters believed education was an important state priority has buttressed this argument;

- local control as a rational justification has become vulnerable;

- traditional equal protection analysis has been discarded;

- education articles in state constitutions containing provisions of efficiency and equal opportunity have been interpreted to require a more equal distribution of financial resources for education at least in states where there is evidence of substantial educational disparities between districts or, as in Kentucky, overall educational inadequacy; and, in conclusion,

- courts have relied solely on the education article of state constitutions to rule on the constitutionality of an educational system and to hold the legislature accountable for its implementation.

CONCLUSION

Trying to find a pattern in the decisions from state courts of school finance suits invites frustration. Each court upholding or overturning an existing system has a substantial body of case law to support either result, with slightly more cases upholding existing systems.[66] Provisions in the education articles of state constitutions have received both narrow and expansive interpretations. State courts have exercised a perhaps unprecedented degree of autonomy in fashioning tests for review or modifying traditional equal protection analyses used in federal constitutional law. But it is text book law that the nature and function of a state constitution differs from that of the federal constitution and different analytical tools are, therefore, acceptable. State versions of the federal equal protection guarantee have not ensured that education will be administered equally to all, even when courts have declared education a fundamental right.

Autonomy to manage financial resources by localities, i.e, local control, in many cases has been held foremost, even if local control for some districts has meant inadequate resources for others and, for the latter, very little effective control. Changes in finance systems could have restructuring implications with dramatic political fallout, a likely explanation for the inaction of state legislatures. California, in its landmark decision in *Serrano I* was the first state to reject the justification of local control and to assign to the state legislature the responsibility for discharging its state constitutional obligation for education irrespective of delegation to local bodies.

The *Edgewood, Helena* and *Rose* decisions have magnified that responsibility. When a state constitution has specified some standard of education to be delivered by the state (be it efficiency, thoroughness, equal opportunities), when the quality of education

[65] (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academia or in the job market. *Rose*, 790 S.W.2d at 212.

[66] Of the 32 case reviewed, 18 opinions have affirmed school finance systems in place and 14 have overturned them (see Appendix).

has clearly been substandard, when the need for improvement has been great but expectations for reforms low—then the courts have intervened, sometimes, as in *Rose*, with unprecedented strength.

In their opinions, judges have repeatedly voiced their concern not to intrude into the legislative field and not to assume a supervisory role over remedial actions. No one has anticipated or advocated judicial tutelage for the enforcement of finance reforms as for school desegregation orders. But an answer to those who view the court's intervention as dangerous judicial activism may be U.S. Supreme Court Justice Souter's reply during his Senate confirmation hearings—courts have a constitutional duty to intervene when the legislature fails to act and to fill the vacuum. After twenty years of litigation, the 1989 decisions may have given school finance reforms a fresh impetus; by targeting constitutional noncompliance by the legislature, those seeking reforms may find their day in court a little more promising.

SIGNIFICANT LITIGATION CHALLENGING STATE EDUCATION FINANCE SYSTEMS[1]

DECISIONS OVERTURNING FINANCE SYSTEMS
1971 through 1990

State	Name of Case	Education provision of State Constitution	Fundamental Right		Judicial Review		Violation of State Constitution	
			Yes	No	Strict Scrutiny	Rational Basis	Equal Protection	Education
Arkansas	Dupree v. Alma School District, 1983	...the State shall... maintain a **general, suitable and efficient** system of free public schools...				x	x	x
California	Serrano v. Priest, 1971	...shall provide for a system of **free** schools...	x		x		x	
California	Serrano v. Priest, 1976	...shall provide for a system of **free** schools...	x		x		x	
Connecticut	Horton v. Meskill, 1977	There shall always be **free** public elementary and secondary schools...every child shall have ...**equal education opportunity** to receive a suitable program of educational experiences.	x		x		x	x
Kansas	Knowles v. State Board of Education, 1976 [2]	...shall provide for intellectual, educational, vocational and scientific improvement by **establishing and maintaining** public schools...	x		x		x	
Kentucky	Rose v. Council for Better Education, 1989	...shall...provide for an **efficient** system of common schools...	x					x[3]

[1] Blank column indicates that topic does not appear in the opinion.

[2] The 1973 School District Equalization Act had been ruled unconstitutional and remanded in 1976 by the Supreme Court in view of the intervening amendments to the Act. The district court of Shawnee County, adopting a rational level of review, declared that the Act was now constitutional. Knowles v. State of Kansas, No. 77CV251 (Shawnee D, Kan. Jan. 26, 1981).

[3] Based on the intent of the drafters of the education article of the Kentucky Constitution on how education should be available.

State	Name of Case	Education provision of State Constitution	Fundamental Right		Judicial Review		Violation of State Constitution	
			Yes	No	Strict Scrutiny	Rational Basis	Equal Protection	Education
Montana	Helena Elementary School District v. State, 1989	**Equality of educational opportunity is guaranteed** to each person...It shall fund and distribute in an **equitable manner**...the state's share of the cost of the...school system.						x
New Jersey	Robinson v. Cahill, 1973	...shall provide for a **thorough and efficient** system of free public schools...		x				x[4]
New Jersey	Abbot v. Burke, 1990	...shall provide for a **thorough and efficient** system of free public schools...		x				x[5]
Texas	Edgewood Independent School District v. Kirby, 1989	...shall make suitable provision for the support and maintenance of an **efficient** system of public free schools.						x[6]
W. Virginia	Pauley v. Kelly, 1979	...shall provide by general law for a **thorough and efficient** system of free schools.	x		x			7

[4] The court could not declare the finance system unconstitutional by following a strict judicial scrutiny analysis or by a violation of the equal protection clause, but found instead that the present system had "no apparent relation" to the mandate for equal educational opportunity.

[5] For 28 out of 29 urban districts.

[6] Based on the intent of the drafters of the education article of the Texas Constitution on how education should be available.

[7] The court did not rule on the constitutionality of the finance system but set forth certain standards to guide the trial court on remand. However, the court did indicate its doubt that the school system in Lincoln County where plaintiffs attended school could meet any "thorough and efficient" standard developed on remand.

State	Name of Case	Education provision of State Constitution	Fundamental Right		Judicial Review		Violation of State Constitution	
			Yes	No	Strict Scrutiny	Rational Basis	Equal Protection	Education
Washington	Seattle School No. 1 v. State, 1978	It is the **paramount duty of the state** to make ample provision for the education of all children . . . shall provide for a general and **uniform** system of public schools.	x[8]					x
Wisconsin	Buse v. Smith, 1976 [9]	...for the establishment of district schools, which shall be as **nearly uniform as practicable...**	x		x			
Wyoming	Washakie County School District v. Herschler, 1980	...shall provide for the establishment and maintenance of a **complete and uniform** system of public instruction...	x		x		x	x

[8] The court held that the state's duty to provide education is superior in rank to all other duties and the correlative right to education has equal stature. The court did not use the words "fundamental right."

[9] The court ruled unconstitutional statutory provisions which would have pooled revenues from property taxes for redistribution to districts with revenues below the state-determined level because they violated the uniform taxation provision of the Wisconsin Constitution, Article VIII, § 21. Although the finance system was overturned, this is in fact a decision against reforms.

SIGNIFICANT LITIGATION CHALLENGING STATE EDUCATION FINANCE SYSTEMS[10]

DECISIONS UPHOLDING FINANCE SYSTEMS
1971 through 1990

State	Name of Case	Education provision of State Constitution	Fundamental Right		Judicial Review		Violation of State Constitution	
			Yes	No	Strict Scrutiny	Rational Basis	Equal Protection	Education
Arizona	Shofstall v. Hollins, 1973	...shall provide for the establishment and maintenance of a **general and uniform** public school system...	x			11		
Colorado	Lujan v. Colorado State Board of Education, 1982	...provide for the establishment and maintenance of a **thorough and uniform** system of free public schools..		x		x		
Georgia	McDaniel v. Thomas, 1981	The provision for an **adequate** education for the citizens shall be a **primary** obligation...		x		x		
Idaho	Thompson v. Engelking, 1975	...establish and maintain a **general, uniform and thorough** system of public schools...		x		x		
Illinois	Blase v. State,[12] 1973	...shall provide for an **efficient** system of **high quality** public education...The State has the **primary responsibility** for financing the system of public education.						

[10] Blank column indicates that topic does not appear in the opinion.

[11] The court refused to find an equal protection violation or a violation of the state education mandate under a rational basis test notwithstanding fundamentality of right to education.

[12] The only question decided by the court was the state's legal obligation to finance 50% or more of the education system. The court ruled that based on historical interpretation of the constitutional debates the state obligation was intended to express a goal and objective, not a legally enforceable obligation.

State	Name of Case	Education provision of State Constitution	Fundamental Right		Judicial Review		Violation of State Constitution	
			Yes	No	Strict Scrutiny	Rational Basis	Equal Protection	Education
Maryland	Hornbeck v. Somerset County Board of Education, 1983	...establish throughout the state a **thorough and efficient** system of Free Public Schools...		x		x		
Michigan	Milliken v. Green, 1973	...shall maintain and support a system of **free** public elementary and secondary schools...		x		13		
Michigan	East Jackson Public Schools v. State, 1984	...shall maintain and support a system of **free** public elementary and secondary schools...		x		14		
Montana	State ex. rel. Woodahl v. Straub, 1974	**Equality of educational opportunity is guaranteed** to each person...It shall fund and distribute in an **equitable manner**...the state's funds to share the cost of the ...school system.				x[15]		
N. Carolina	Britt v. N. Carolina State Board of Education, 1987	...provide... a **general and uniform** system of free public schools...wherein **equal opportunities** shall be provided for all students.	x[16]			x		

13 Level of review was not discussed on rehearing when 1972 judgment of Michigan Supreme Court was vacated.

14 Plaintiff had not claimed deprivation of education but only challenged inequalities of funds.

15 Review only encompassed Chapter 355, a state statute to partially fund the Foundation Program.

16 While equal access to education ranked as a fundamental right, equal educational opportunities did not.

State	Name of Case	Education provision of State Constitution	Fundamental Right		Judicial Review		Violation of State Constitution	
			Yes	No	Strict Scrutiny	Rational Basis	Equal Protection	Education
New York	Board of Educ. v. Nyquist, 1982	...provide for the maintenance and support of a system of **free** common schools...		x		x		
Ohio	Board of Education v. Walter, 1979	...will secure a **thorough and efficient** system of common schools...				x		
Oklahoma	Fair School Finance Council of Oklahoma v. State, 1987	Provisions shall be made for the **establishment and maintenance** of a system of public schools...		x		x		
Oregon	Olsen v. Oregon, 1976	...shall provide by law for the establishment of **a uniform** system of common school...				x[17]		
Pennsylvania	Danson v. Casey, 1979	... shall provide for the maintenance of a **thorough and efficient** system of public education...				x		
S. Carolina	Richland County v. Campbell, 1988	...shall provide for the maintenance and support of a system of **free** public schools...				x		
Washington	Northshore School District v. State, 1974 [19]	It is the **paramount duty of the state** to make ample provision for the education of all children...shall provide for a **general and uniform** system of public schools.		x[18]				

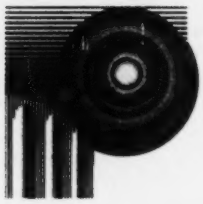
[17] The court used a balancing test weighing the detriment to the education in certain districts against the justification for the financing scheme.

[18] The court did not address issue of fundamentality but refused to declare the state's duty to provide education to be its supreme obligation to the reduction of all other duties.

[19] Plaintiffs did not assert that the state had not discharged its "paramount" duty but only that children living in areas of low property assessments were denied equal protection under federal and state constitutions and that the entire system was therefore unconstitutional. The court found no evidence to support correlation of low assessments and privation of equal protection. Low assessments did not impact to a constitutionally impermissible degree on amounts available or expended per student.

State	Name of Case	Education provision of State Constitution	Fundamental Right		Judicial Review		Violation of State Constitution	
			Yes	No	Strict Scrutiny	Rational Basis	Equal Protection	Education
Wisconsin	Kukor v. Grover, 1989	...shall provide by law for establishment of district schools which shall be as nearly uniform as practicable...	x			x[20]		

[20] The court held that "equal opportunity for education" is a fundamental right but declined to apply a strict scrutiny analysis in this case because plaintiffs were attacking equality of expenditures rather than equality of educational opportunity.



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about NSBA . . .

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Federation Members of NSBA are the state associations of local school boards, the Hawaii State Board of Education, and the boards of education in the District of Columbia and the U.S. Virgin Islands.

NSBA promotes the quality of public elementary and secondary schools through services to its Federation Members and local school boards; by increasing school board impact on federal education laws and regulations; and by maintaining liaison with other education organizations and governmental authorities.

In so doing, NSBA represents the interests of school boards before Congress, federal agencies and in court cases relating to education; provides education and training programs for school board members; provides school district management services; and offers to school boards a variety of other services including an annual convention and the Institute for the Transfer of Technology to Education (ITTE).

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- The Council of School Attorneys focuses on issues of school law.
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- The Federal Policy Coordinators Network focuses on the administration of federally funded programs.
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Founded in 1940, NSBA represents the nation's 97,000 school board members who, in turn, represent the more than 40 million public school children in the U.S., who account for about 90% of all elementary and secondary school students in the nation. More than 2,000 local school boards are NSBA Direct Affiliates.

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